Supreme Court, U.S.
FILED
JAN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-354, 85-955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MALCOLM BALDRIGE, *et al.*,
Petitioners,
v.
AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

JAPAN WHALING ASSOCIATION, *et al.*,
Petitioners,
v.
AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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January 2, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

As Petitioners Baldrige and Schultz point out, the Packwood-Magnuson Amendment calls for the Secretary of Commerce to certify those nations whose nationals conduct whaling operations that "diminish[] the effectiveness of the International Convention for the Regulation of Whaling." 16 U.S.C. § 1821(e)(2).

The consequent question presented is whether the Secretary of Commerce can refuse to certify Japan's defiance of the ban on whaling decreed under the Convention by the International Whaling Commission.

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* Pursuant to Rule 28.1, Respondents state that none of the Respondents that are incorporated organizations have any parent, subsidiary or affiliate that has any outstanding securities in the hands of the public.

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Respondents American Cetacean Society, Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, The Fund for Animals, Greenpeace U.S.A., The Humane Society of the United States, International Fund for Animal Welfare, The Whale Center, Connecticut Cetacean Society, De-

fenders of Wildlife, Friends of the Earth and Thomas Garrett respectfully request the Court to deny the petitions for writs of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

RESPONDENTS' STATEMENT OF THE CASE

The ultimate issue in this proceeding, which Petitioners omit to mention, is whether Japan shall continue the "systematic devastation" of the remaining great whales of the world's oceans for commercial purposes (App. 60a).[1] These creatures are the largest animals ever to inhabit our planet. The sperm whale has the most complex brain ever known. It lives in a social system that is just beginning to be understood by man. That system seems to grant a special leadership and reproductive role to the very bulls which are the natural target of the Japanese hunters. Any further reduction in their numbers could well be decisive to the collapse of the species.

The International Convention for the Regulation of Whaling ("Convention"), which created the International Whaling Commission ("IWC"), entered into force on November 10, 1948, 62 Stat. 1716, T.I.A.S. No. 1849, and arose out of a recognized need to "establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks * * *." Preamble, 62 Stat. 1716. Under the Convention, the IWC establishes whaling quotas and other regulations governing whaling methods and seasons. Art. V, 62 Stat. 1718. From the outset of the IWC's existence, the establishment of harvest limits has been the very heart of its work.

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[1] "App." refers to the appendix to the petition for a writ of certiorari filed on behalf of the Federal Petitioners. "J.A." refers to the Joint Appendix filed by the parties in the court below.

The Convention itself has no teeth. The Convention does not affect nonmember nations and expressly allows even member countries to exempt themselves from any of the IWC's decisions to which they object. Art. V, 62 Stat. 1719. To provide enforcement leverage for the IWC's quota determinations, Congress in 1971 enacted Section 8(a) of the Fishermen's Protective Act (the "Pelly Amendment") to provide a trade sanction that would compel adherence to fishing quotas established by international agreement, 22 U.S.C. § 1978(a). During the next seven years, the Secretary of Commerce implemented the Pelly Amendment by "certifying" that five nations—Japan, the Soviet Union, Chile, Peru and the Republic of Korea—were whaling in violation of IWC quotas (J.A. 168-72, 177-86). In each case, however, the President exercised his discretion under the Pelly Amendment *not* to impose trade sanctions in light of assurances from the offending countries that they would comply with the IWC's quotas the next year (J.A. 175-76, 193-96).

This course of events was unacceptable to Congress. In 1979, Congress adopted Section 201(e)(2) of the Fishery Conservation and Management Act (the "Packwood-Magnuson Amendment") to create a nondiscretionary sanction against countries that violate IWC whaling quotas or otherwise "diminish the effectiveness" of the Convention. Packwood-Magnuson mandates that the fishing allocation in United States waters of the offending country "shall be reduced by the Secretary of State * * * by not less than 50 percent." 16 U.S.C. § 1821(e)(2)(B).

These actions by Congress came none too soon. Foreign whalers, having all but destroyed the world's populations of blue, humpback and right whales (J.A. 127), had begun to train their harpoons on what they perceived to be the principal remaining "available" species: the sperm whale, the Bryde's whale, and the minke whale. In 1981 the decimation of the North Pacific

sperm whale led the IWC to adopt a zero quota for that stock by a 25-1 vote with only Japan opposed (J.A. 129). In 1982, after an intense, decade-long review of the scientific data, the IWC took the historic step of establishing, by the vote of over three-quarters of its members, a moratorium on all commercial whaling to commence in 1986 (J.A. 129).[2]

Japan has refused to abide by these crucial decisions of the IWC. Accordingly, on November 8, 1984 Respondents filed this action in the United States District Court for the District of Columbia, seeking to require the Secretary of Commerce to certify Japan under Packwood-Magnuson and thereby set into motion the automatic sanctions that Congress intended (App. 12a). On March 5, 1985, the district court granted respondents the relief they sought (App. 56a-86a). On August 6, 1985, the court of appeals affirmed (App. 1a-55a).

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[2] Petitioners suggest that the only thing at stake here is whether Japanese whaling stops now or continues until 1988. Thus, Federal Petitioners state that Japan has agreed to "effectively *terminate its commercial whaling industry* by April 1, 1988" (Federal Petitioners' Petition for a Writ of Certiorari at 4) (emphasis supplied). The continued taking of sperm, minke and Bryde's whales in the interim is serious enough, and creates a grave risk to the existing diminished populations, as the IWC found. But in fact it is by no means certain that the Japanese "industry" will be shut down, even in 1988. The agreement does not say as much; it merely provides for the withdrawal of Japan's IWC objection to the moratorium. Furthermore, as we pointed out to the court below (Tr. Feb. 20, 1985, at 17) within weeks of the Baldrige-Murazumi agreement, Japan had proposed a new category of sperm and Bryde's whaling to cover what it called "coastal subsistence whaling." This strongly suggests that Japan intends under the Baldrige-Murazumi arrangements to continue its "industry" well after 1988.

REASONS FOR DENYING THE WRIT

Summary of Argument

Petitioners seek to portray the judgment below as one which "trenches . . . deeply on the conduct of foreign affairs" (Int. Pet. at 13) and departs from the "classical deference" afforded the political branches in matters of foreign policy (Fed. Pet. at 10).[3] In fact, Congress created the United States' 200-mile Fishery Conservation Zone and conditioned the rights of foreign nationals to fish within that Zone on the obligation of their home countries not to diminish the effectiveness of IWC quotas. It was by statute, not by the President's inherent powers in matters of foreign policy, that ministerial responsibility to carry out the legislative scheme was placed in the Executive Branch. When the conduct of the Executive Branch clearly contravenes the "overall tenor" of Congress' legislation, the Executive's power is at its "lowest ebb" and will not be sustained by the courts. *Dames & Moore* v. *Regan*, 453 U.S. 654, 668-669, 679 (1981) (quoting in part *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637-638 (1952) (Jackson, J., concurring).

In 1971, Congress enacted the Pelly Amendment specifically to create a trade sanction against countries that violate international fishing quotas or otherwise "diminish the effectiveness" of international fishery conservation programs. In 1979, Congress enacted Packwood-Magnuson to create an additional, mandatory economic sanction against nations that violate IWC limits. It did so despite the same pleas from the Executive Branch for "discretion" and "diplomatic flexibility" that peti-

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[3] "Fed. Pet." refers to the petition for a writ of certiorari filed by Federal Petitioners Baldrige and Schultz. "Int. Pet." refers to the petition for a writ of certiorari filed by Intervenor Petitioners Japan Whaling Association and Japan Fisheries Association.

tioners now redirect to this Court. Finally, Congress adopted Packwood-Magnuson in reliance on the consistent administrative practice of certifying *all* nations that intentionally contravened IWC quotas and in further reliance on explicit assurances from the Department of Commerce that the future taking of whales in contravention of the IWC quotas would mandatorily and automatically be certified by the Secretary—assurances repeated by Petitioner Baldrige only months before he made the arrangement with Japan at issue here.

On the strength of this extraordinarily pointed legislative history, the petitions for certiorari should be denied. The judgment of the court of appeals is correct and presents no conflict with the decisions of this Court or any other court of appeals. Nor is there presented a question of federal law sufficient to warrant this Court's attention. The Packwood-Magnuson Amendment has never before been the subject of litigation and there is no serious likelihood that the question will arise again. The most that Petitioners can suggest is that an executive agreement with Japan is at stake. But because the Executive Branch did something that it did not have the statutory authority to do is no reason to grant a writ of certiorari. This is particularly so when granting the writ would occasion delay in bringing to an end Japan's irreparable slaughter of thousands of minke, Bryde's and sperm whales in the North Pacific and Antarctic Oceans.

The petitions should be denied because the resolution by the courts below of the legal questions presented was, as we shall now show, entirely in harmony with this Court's teachings and represented no departure from accepted proceedings.

I. THE PACKWOOD-MAGNUSON AMENDMENT REQUIRES THE SECRETARY OF COMMERCE TO CERTIFY INTENTIONAL VIOLATIONS OF IWC QUOTAS

A. The Statute by Its Terms Reaches a Violation of IWC Zero Quotas

Packwood-Magnuson says that the Secretary of Commerce shall certify whaling which "diminishes the effectiveness" of the Convention.[4] The courts below gave this a plain and straightforward meaning. They held that Japan's defiance of the zero quotas established by the IWC "diminished the effectiveness" of the Convention.

There is hardly much room for argument that it does not. The IWC is the chosen instrument of tl. Convention. It is the body delegated by multinational agreement to implement the Convention's objectives. The IWC decided in 1982 to stop all sperm whaling in 1984 and all whaling of any species in 1986. Japan is continuing to kill thousands of whales in the face of these determinations. Petitioners can scarcely suggest that this defiance of the IWC's decisions enhances the prestige, strengthens the authority or adds to the reputation and weight of either the IWC or the Convention. Indeed, Japan's violation of the general moratorium flies in the face of the most thoroughly debated decision in the IWC's history. It would be difficult to imagine any ac-

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[4] Intervenor Petitioners' argument that Packwood-Magnuson constitutes an unconstitutional delegation of power to the IWC is, as their petition freely concedes, without judicial precedent. Int. Pet. at 22.

Nor is there any merit to Intervenor Petitioners' contention that Packwood-Magnuson, as applied below, would violate the Convention because the Convention gives them a right to object to whaling quotas. No provision of the Convention obligates other parties to honor a nation's objection or to withhold economic pressure on that nation to comply with IWC quotas. Therefore, the case is indistinguishable from *Moser* v. *United States*, 341 U.S. 41, 45 (1951).

tion which more clearly "diminishes the effectiveness" of the international system.

Instead, Petitioners make what sounds like a more conventional plea. They seek the blank check of "executive discretion." They say that "diminish the effectiveness" has no ascertainable independent meaning, and so should be read as giving the Secretary unfettered freedom to apply it or not, as he may choose. What Petitioners want, in other words, is that the Secretary should be permitted to call black white and white black. He should be allowed solemnly to find, against the common sense of things, that an action—particularly this Japanese defiance of the Commission's historic decision to stop all commercial whale hunting now—had no impact on the Convention's effectiveness. Such an argument is unreasonable on its face.

B. The Legislative History Confirms that the Secretary Has No Discretion to Ignore Whaling in Excess of Commission Quotas

The legislative histories of Packwood-Magnuson, and its predecessor, the Pelly Amendment, confirm that Congress intended reduced fishing rights in the U.S. Fishery Conservation Zone to be an automatic, mandatory and non-discretionary sanction against any nation that intentionally allowed its nationals to violate IWC whaling quotas. This was seen as the paradigm case of action that would "diminish the effectiveness" of the convention.

The Pelly Amendment was addressed, above all else, to the fact that several nations were intentionally ignoring high-seas fishing quotas established by international agreement—particularly those governing Atlantic salmon and whales. The wording of the statute permitted the Secretary to certify other practices as well, including many not contemplated by Congress, that might also "diminish the effectiveness" of the Convention. But the single point emphasized throughout the legislative history

is that the Pelly Amendment sanctions were created for the express purpose of penalizing nations that evaded overall limits on the catch or quotas. The House Committee Report stated, for example: "The Committee wished to be *absolutely certain* that the ICNAF ban on the taking of Atlantic Salmon now in force would qualify under the foregoing definition." H.R. Rep. No. 468, 92d Cong., 1st Sess. 8 (1971) (emphasis supplied). Indeed, when offending conduct took place, Congress made certification automatic.[5] And the representatives of the Departments of Commerce and State embraced this reading of the statute in 1971:

> "It was our intention in our modifications to the bill that if the majority of nations did accept a regulation or a ban on salmon fishing and that regulation applied to U.S. fishermen, and one of the nations in the convention or one of the nations not a member didn't agree with it, as far as trade with the United States was concerned, that *such trade restrictions would be applied to fishery products of that nation.*" [6] (Emphasis supplied.)

The Secretary of Commerce complied with this view of the statute from 1972 through 1978 in certifying five nations under the Pelly Amendment for intentionally ex-

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[5] The statute directs that the Secretary "shall certify" offending conduct. The legislative history consistently uses similar mandatory language. *E.g.*, H.R. Rep. No. 468, 92d Cong., 1st Sess. 6 (1971) ("Section 8(a) directs the Secretary of Commerce to certify"); 117 Cong. Rec. 34, 751 (1971) (statement of Rep. Dingell) ("the Secretary of Commerce would be required to certify"); 117 Cong. Rec. 47,053 (1971) (statement of Sen. Stevens) ("he must certify").

[6] *Atlantic Salmon: Hearings on H.R. 3304, H.R. 3305,* H.R. *3841, H.R. 4928, and H.R. 7242 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries,* 92d Cong., 1st Sess. 394 (1971) (testimony of Donald L. McKernan, Special Assistant to the Secretary of State for Fisheries and Wildlife); *accord* H.R. Rep. No. 468, *supra,* at 10 (quoting a letter from the Department of Commerce to the House Committee on Merchant Marine and Fisheries).

ceeding IWC whaling quotas. In each case the certification was made despite the fact that the nation involved had already agreed to comply with the quotas the very next year.

In each case, the President decided not to impose import embargoes by pointing to the commitments of future compliance. And Congress balked. It concluded that automatic certification coupled with discretionary sanctions, however desirable the flexibility might seem to the State Department, simply would not serve Congress' objective of putting teeth into the multilateral conservation of the world's remaining whales. There was too much scope for Executive Branch backpeddling under pressure from a whaling nation. So in Packwood-Magnuson in 1979 it continued the automaticity of the certification and eliminated the discretion as to the penalty. The Packwood-Magnuson Amendment was adopted in direct response to the President's consistent refusal to impose any sanctions on the countries certified to be exceeding IWC whaling quotas. For better or for worse, Congress plainly meant to create a mandatory sanction for violating the internationally established IWC quotas that would not be subject to Executive Branch discretion to waive or avoid:

> "Mr. Speaker, to date, the Pelly amendment has been somewhat effective in encouraging compliance with fishing agreements. The major weakness has been that certification does not necessarily impose any penalty on the violator. In fact, in all five certifications to date, the President has not used his discretionary power to impose a penalty.
>
> "In order to improve the effectiveness of the Pelly amendment, the legislation before us will provide for a specific penalty to result from certification." 125 Cong. Rec. 22,083-84 (1979) (Statement of Rep. Oberstar).

By 1979 it was the common understanding of both political branches that, when violations of quotas were in-

volved, the certification provisions in Pelly imported no discretion. So Congress made no change in Pelly's certification standard of "diminish the effectiveness" when it wrote Packwood-Magnuson. Plainly Congress did not mean to import by the back door into Packwood-Magnuson's certification the very same discretion it intended to remove when it tightened up Pelly's sanctions provision.

Petitioners argue that the language of the statute could have been clearer. But there was nothing to clarify. Both the Congress and the Administration had the same understanding of the Pelly certification language—that it contained no hint of the discretion now sought. In considering Packwood-Magnuson, Congress sought and obtained assurance from the Department of Commerce that certification by the Secretary of IWC quota violations was mandatory and nondiscretionary:

> "Mr. McCLOSKEY. . . . But the *certification* step is a mandatory act under the law. It *is not a discretionary act.*
>
> "Mr. FRANK [Administrator of the National Oceanic and Atmospheric Administration.] *That is correct.*
>
> . . . .
>
> "Mr. BREAUX. I understand, Mr. Frank, that actually what we are talking about under the Pelly amendment is a two-stage process. First, if a country is violating the terms of an international treaty, the Secretary of Commerce has to certify that he is doing that, and that is not a discretionary thing. But after he certifies that there is a violation, and there is discretion on the part of the President to impose any import quotas, . . . the second part is the optional authority that the President has.
>
> "Mr. FRANK. That is correct. *the first one is mandatory on the Secretary of Commerce.* The second is discretionary on the part of the President." *Whaling Policy and International Whaling Commission Oversight: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the En-*

> *vironment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 322-23 (1979) ("*1979 Oversight Hearings*") (J.A. 203-04). (Emphasis supplied.)

Administrator Frank's testimony in 1979 consistently contrasted violation of nonbinding resolutions, on the one hand, with intentional exceeding of IWC quotas, to which "it is clear that the Pelly amendment would apply":

> "Mr. FRANK. We have used the Pelly amendment most recently in connection with Peru, Chile, and South Korea. They were the most flagrant violators because they were taking whales without regard to IWC quotas.
>
> . . . .
>
> "IWC resolutions are not binding. If a country were violating something in the schedule, for example, taking more whales than the schedule provides, and that were a significant violation, I believe it is clear that the Pelly amendment would apply. I think it is a more difficult question if a country is violating something that is a recommendation but not binding." *1979 Oversight Hearings* 311-12 (J.A. 200-201).

Petitioners' analysis of the legislative history relies on oblique quotations of Representative Breaux that refer to the discretion of the Secretary in making certification decisions—quotations that in fact refer to his discretion to certify *other* activities, in addition to intentional contravention of whaling quotas, that might also diminish the effectiveness of the Convention. Representative Breaux fully understood, as did the entire Congress, the interpretation of the Department of Commerce in 1979 that certification is mandatory if a nation intentionally contravenes IWC whaling quotas:

> "Apparently Dick Frank is saying that the *taking of whales in violation of IWC quotas is something that automatically would require the Department of Commerce to certify* that nation as being in violation of the taking provision. Then you get into two other categories, not supplying enough data and the

> importation of whale meat." *1979 Oversight Hearings* at 359 (statement of Rep. Breaux) (emphasis supplied).

And there was no doubt in Senator Packwood's mind when he explained his amendment on the Senate floor:

> "[I]f any nation that fishes within the 200-mile zone violates the whaling conservation regulations, they will immediately, not having to wait until their permit can be renewed, lose 50 percent of their allocation for fishing within our 200-mile zone." 125 Cong. Rec. 21,743 (1979).

Petitioners argue that all of the direct legislative history explaining the intended application of Pelly and Packwood-Magnuson to enforce the Whaling Convention should be ignored in deference to a single 1978 House committee report statement concerning a different statute on endangered species. But the legislative histories of Pelly and Packwood-Magnuson leave no question that Congress understood that intentional whaling in contravention of IWC quotas necessarily "diminishes the effectiveness" of the IWC and the Convention. That intent is not overcome by a House Committee statement a year earlier concerning legislation pertaining to treaties having nothing to do with setting marine resource quotas.[7] Respondents have maintained from the outset that the Secretary has the responsibility of determining whether *other* conduct—such as the use of certain types of harpoons or practices relating to record keeping—diminishes the effectiveness of the Convention. He lacks discretion, however, with respect to intentional contravention of whaling quotas—the overriding evil that

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[7] Likewise, although the court of appeals was clearly correct in its analysis of the legislative history of the Tuna Convention Act of 1950 (as amended) (App. 26a-29a), the specific intent of Congress in enacting the Pelly and Packwood-Magnuson Amendments is so clear as to obviate any need to look to secondary evidence of probable intent such as use of similar language in other statutes.

the Packwood-Magnuson Amendment was intended to penalize.[8]

C. The Argument for Executive Discretion Was Expressly Rejected by Congress

Federal Petitioners implore that the Executive Branch must be able to apply "its special knowledge of foreign relations, conservation dynamics, and treaty requirements to assure the maximum effectiveness of the ICRW"; they entreat that "[a] strict, inflexible rule of automatic certification is likely to increase disharmony among nations and impede conservation efforts." Fed. Pet. at 20-21. We might suggest that there will be quite enough international disharmony from the U.S.-Japanese flouting of the zero quotas set by the vote of over three-quarters of the member nations of the Convention. Instead, we refer only to the fact that these are the same arguments the Federal Petitioners made unsuccessfully to Congress in 1979. In contrast to its view now, the State Department argued at the time, in support of its proposal to change the bill and introduce more flexibility, that:

> "[Packwood-Magnuson] appears to provide *little flexibility or discretion* in its implementation.
>
> . . . .
>
> "[W]hat the Packwood amendment does is perhaps go a bit too far in *tying the administration's hands in its ability to deal with these problems on a diplomatic basis.*" *Fishery Conservation and Management Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environ-*

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[8] Nor does the holding of the court of appeals, even if it were to govern other statutes, which it does not pretend to do, threaten the dire international consequences hypothesized by Federal Petitioners. Fed. Pet. at 21-22. Even if the Pelly and Packwood-Magnuson legislative history controlled the *certification* process under the endangered wildlife amendment, the latter provision contains no mandatory sanctions but gives the President total discretion to withhold sanctions.

> *ment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 313, 323 (1979) (J.A. 209, 218) (statements of John Negroponte, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs) (emphasis supplied).

The Commerce Department argued: "[Packwood-Magnuson] should be modified to allow some flexibility to respond proportionately to the nature and scope of the particular offense." *Id.* at 314 (J.A. 210) (statement of Eldon V.C. Greenberg, General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce).

The State Department specifically proposed creating a delayed compliance period prior to sanction:

> "Mr. NEGROPONTE. I think if we could decouple the certification process from the process of actually reducing allocations so that once there has been a certification, there is time then to go to Japan or any other country and say, look, this step has been taken. Do you realize if you don't do anything to remedy the situation which caused it, that next year we will be forced to reduce your allocations?" *Id.* at 325 (J.A. 220).

Congress not only rejected these arguments. It even revised Packwood-Magnuson after this testimony to provide for *immediate* partial suspension of fishing quotas under permits already issued rather than only a prohibition on issuing new permits after a certification. Congress explicitly opted for a "sanctions first; negotiation later" process—just the opposite of the State Department proposal. So much for Executive Branch discretion.

Thus, as enacted, Packwood-Magnuson requires immediate suspension of at least 50 percent of any issued fishing quota, but provides for reinstatement of the suspended quota if negotiations bring the offending nation into compliance with IWC policy within a 365-day "re-

medial period."[9] If the nation remains in noncompliance after one year, the temporary suspension becomes permanent, the remainder of the quota is forfeited and future allocations to that country are barred. 16 U.S.C. § 1821(e)(2)(D). Neither the statute nor the legislative history can be read to permit the Secretary to ignore these statutory requirements and create his own four-year "remedial period"—as the Baldrige-Murazumi correspondence purports to do.

D. The Secretary Has Consistently Recognized the Mandatory Requirement to Certify Intentional Contravention of Whaling Quotas

Federal Petitioners' principal claim that the Secretary may ignore a wholesale quota violation fell on deaf ears in the courts below, not only because the Baldrige-Murazumi correspondence violates the intent of Congress, but because it is also quite out of harmony with past administrative practice. As Judge Richey correctly concluded: "The Executive Branch, prior to enactment of the Pelly Amendment in 1971, and until as recently as July 24, 1984, consistently has taken the position that intentional fishing in excess of duly established international quotas necessarily 'diminishes the effectiveness' of the applicable fisheries conservation program." (App. 73a.) In every one of the five certifications that were issued from 1972 through 1978, the offending country had committed *prior to the certification* to come into compliance with IWC quotas the very next year (J.A. 171, 177-78). Yet in each case the Secretary certified the country as having "diminished the effectiveness" of the IWC whale conservation program.

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[9] It is nonsense to argue, as Intervenor Petitioners do, that the order of the district court in this case would impose punitive sanctions for *past* conduct undertaken in reliance on the Baldrige-Murazumi correspondence. Int. Pet. at 13. Japan can avoid *any* impact of certification at any time simply by terminating its commercial whaling.

It is no answer to hypothesize, as do federal petitioners (Fed. Pet. at 21 n.5) that discretion may be warranted in situations involving aboriginal subsistence whaling. Indeed, in *Adams* v. *Vance*, 570 F.2d 950 (D.C. Cir. 1978), the government was faced with just such a situation involving the subsistence hunt of bowhead whales by Alaskan Eskimos and confirmed its longstanding interpretation that the effectiveness of the Convention demanded the scrupulous adherence to IWC quotas. In that case, the IWC had established a "zero" quota for the taking of bowhead whales by Alaskan Eskimos. When the United States decided not to object to the quota, and thereby claim an exemption under the Convention, the Alaskan Eskimos immediately sued to compel the filing of an exemption. The Executive Branch contended that such a one-time objection, even if later withdrawn, would devastate the international regulation of whaling. Affidavits from representatives of the Department of Commerce and Department of State averred that any U.S. approval of whaling in contravention of IWC quotas "would seriously weaken the effectiveness of the International Whaling Commission" (J.A. 139), "could result in the breakdown of the IWC" (J.A. 154), and would cause "the *almost certain collapse of the IWC as an effective mechanism for whale conservation*" (J.A. 158).

Nor can Federal Petitioners' contentions be reconciled with assurances given to Congress by the Secretary of Commerce as recently as July 24, 1984. In late June of 1984, Senator Packwood wrote to the Secretary to seek assurances that any nation continuing whaling despite the IWC moratorium would be certified under Packwood-Magnuson. Secretary Baldrige responded in the strongest possible affirmative terms:

> "You noted in your letter the widespread view that *any continued whaling* after the International Whaling Commission (IWC) moratorium decision takes effect *would be subject to certification. I agree*, since any such whaling attributable to the policies of a

foreign government *would clearly diminish the effectiveness of the IWC.*" Letter from Secretary of Commerce to Senator Packwood (July 24, 1984) (J.A. 198) (emphasis supplied).

E. The Secretary Has No Authority to Ignore the Law, Nor Must the Courts Stay Their Hand, Merely Because Foreign Relations May Be Affected

As a final finger on the scale, Federal Petitioners invoke the Court's reference in *Regan* v. *Wald*, 104 S. Ct. 3026, 3039 (1984), to the judiciary's " 'classical deference to the political branches [*sic*] in matters of foreign policy.' " Fed. Pet. at 19. The implication is that courts should accept the Executive's reading of a statute whenever the statute affects international relations even if that reading is incompatible with Congress' intent and offends the common sense meaning of the words of the statute.

This case admittedly affects international affairs. Congress chose to condition access to U.S. territorial fishing on strict compliance with the quotas of the International Whaling Commission. It cast its lot with a multilateral system for protecting what remains of the world's populations of these great creatures. In this case the Secretary of Commerce substituted his own judgment for the IWC's. He would replace a multilateral with a bilateral regulatory system.

Federal Petitioners contend that it is better that way —that by ignoring the IWC's zero quota and substituting the Secretary's judgment, many advantages follow. Indeed, so important is it that Washington's rule-making replace the IWC's that Federal Petitioners contend the Secretary should even be allowed to refuse "certification of countries that depart from IWC requirements that the United States itself considers unreasonable." *Ibid.*

Congress chose otherwise. It considered the plea of the Executive Branch for freedom and discretion; it heard the arguments that the nation's foreign policy might be affected if it backed the multilateral system. But it had had enough of the Pelly Amendment scheme which gave the Executive the freedom to decide whether to sanction a defiance of whaling quotas or not. It wanted no more Executive discretion.

Of course the Executive Branch prefers the freedom to maneuver. Of course it would like to balance the interest of whale conservation against other aspects of our relations with Japan. Of course it would prefer not to be required to penalize that country when it offends the IWC's quotas. But the issue has been decided otherwise. Congress tied foreign fishing in U.S. territorial seas to a multilateral, not a bilateral, whale conservation system. This was within Congress' power; it was establishing one of many terms to its grant to foreign nations of the privilege of fishing in American waters. And the interpretation and application of that statutory standard is properly judicial, though foreign policy interests may be engaged.

There is nothing in *Regan* v. *Wald*, or any other decision of this Court, that suggests the judiciary should relinquish to the Executive its constitutional obligation to say what the law is, merely because there may be consequences beyond our borders. Indeed, both the majority and dissenting opinions in *Regan* v. *Wald* demonstrate the careful scrutiny of the legislative record which the courts are obligated to undertake to determine whether Executive action is consistent with Legislative will.

Regan v. *Wald* also answers Intervenor Petitioners' suggestion that this case is nonjusticiable because it touches on foreign affairs. If such a doctrine existed, *Regan* v. *Wald* would have been the appropriate opportu-

nity for its application. The Fishery Conservation Zone, rights to fish within that Zone and conditions on those fishing rights, all were created by Congress through duly enacted legislation. It was by statute, not the President's inherent powers in that "vast external realm," which placed ministerial responsibilities for carrying out the legislative scheme in the Executive Branch. The justiciability of the execution by the Executive Branch of the laws of the United States has been beyond question since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).

The doctrine of this Court that properly guided the courts below was repeated most recently by Justice Rehnquist on behalf of the Court in *Dames & Moore* v. *Regan*, 453 U.S. 654, 669 (1981): "when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the Court can sustain his actions 'only by disabling the Congress from acting upon the subject.'" *Quoting Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 637-38 (Jackson, J., concurring). Justice Frankfurter, in his concurring opinion in *Youngstown* stated the point this way, and in terms that seemed to suggest he had something like this very case in mind:

> "It is quite impossible, however, when Congress did specifically address itself to a problem, . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress." 343 U.S. at 609.

II. THE COURT OF APPEALS PROPERLY REFUSED TO DISTURB THE EQUITABLE RELIEF GRANTED BY THE DISTRICT COURT

Petitioners' argument that the district court abused its discretion and offended equity in ordering the Executive Branch to carry out Packwood-Magnuson—that statutory integrity should be sacrificed to "Executive Branch credibility"—is as dangerous as it is novel. It would rule out mandamus in any matter touching foreign affairs, and give the Executive Branch a free hand and an incentive to make agreements to do whatever it wanted to do, whatever the law might say. An international promise would then bootstrap the Executive out of any statutory constraint.

Moreover, there are no equitable circumstances here in favor of petitioners. They were on full notice. Both the Intervenors and the Executive Branch participated in the legislative consideration of Packwood-Magnuson in 1979, testified at the hearings, opposed and sought modification of the legislation, and are well aware that their pleas for discretion were rejected.

The prospective filing of this particular challenge was announced at a public news conference on November 2, 1984—eleven days before the Baldrige-Murazumi exchange—and was widely publicized in the print and electronic media. The complaint was actually filed on November 8, 1984 (J.A. 3, 85), again before the November 13 agreement. On November 15, 1984, before Japan had taken any action in arguable reliance on the Secretary's letter, the Embassy of Japan was given a copy of the complaint and an accompanying letter explaining the illegality of the Secretary's action. Four days later, a copy of Respondents' November 19, 1984 petition to the Secretary to undertake certification of Japan (App. 67a) also was delivered to the Embassy of Japan. On December 11, 1984, still prior to any action by Japan, Respond-

ents filed their motion for summary judgment (J.A. 5) and delivered a copy of that document to the Embassy of Japan. This is a case in which Federal Petitioners, Intervenor Petitioners and the Government of Japan proceeded with full notice and knowledge that they were acting at their peril.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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January 2, 1986